

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

UNPUBLISHED
December 22, 2011

v

KENNETH JEROME HUGHES, III,

Defendant-Appellant.

No. 301051
Berrien Circuit Court
LC No. 2010-001529-FC

Before: HOEKSTRA, P.J., and K.F. KELLY and BECKERING, JJ.

PER CURIAM.

Defendant appeals as of right following his jury trial convictions for armed robbery, MCL 750.529; first-degree home invasion, MCL 750.110a(2); possession of a firearm by a felon, MCL 750.224f; and possession of a firearm during the commission of a felony, MCL 750.227b. The trial court sentenced defendant as an habitual offender, third offense, MCL 769.11, to 240 to 600 months' imprisonment for armed robbery, 192 to 480 months' imprisonment for first-degree home invasion, 57 to 120 months' imprisonment for possession of a firearm by a felon, and two years' imprisonment for felony-firearm. We affirm defendant's convictions but remand for the administrative task of correcting the clerical error contained in the judgment of sentence.

I. BASIC FACTS

James Stainbrook lived in a house on Butler Street in Benton Township. On the evening of Saturday March 27, 2010, Stainbrook and his friend, Daniel Merritt, were at Stainbrook's house, watching motorcycle races on television and enjoying a few drinks. At approximately 10:00 p.m. Stainbrook heard a knock at his front door. Stainbrook opened the door to find a gun pointed directly at his face. The gunman was approximately six feet tall and 190 to 200 pounds. He wore a dark "hoodie" over his head and a dark bandana with some white design covering his face. A small portion of the gunman's face was showing and he appeared to be a black man. From the gunman's voice, Stainbrook estimated him to be in his twenties.

As Stainbrook took a few steps backwards into the living room, the gunman and a second intruder entered the home. The second intruder also carried a gun and also wore a hooded sweatshirt and a bandana across his face. The first gunman ordered Stainbrook to "get down." While Stainbrook knelt on the floor, the gunman pointed the gun at Stainbrook's head and said, "[w]here's the f***ing money?" Stainbrook replied that it was in his wallet, but the gunman

repeated his question. While still keeping his face to the floor, Stainbrook took his wallet out of his pocket and reached it up to the gunman. Rather than taking the wallet, the gunman cocked the gun. Stainbrook took all his cash, around \$140, out of the wallet and laid it on the floor for the gunman to pick up.

Meanwhile, the second intruder confronted Merritt, who was sitting on the couch when the men entered. Faced with the intruder, Merritt ended up rolling over, face down on the couch. The second gunman took Merritt's wallet which contained \$340 in cash, identification cards, credit cards, and a key card for work. The intruders fled. As Stainbrook and Merritt regained their bearings to call police, Stainbrook noticed his work cellular telephone was now missing. They used Merritt's cell phone to summon police, who arrived minutes later.

A police officer arriving at the scene noticed a green Chevy Impala parked five or six houses away from Stainbrook's home. No one was inside the car and it was gone when the officer left the scene. Lakeisha Parks, a nearby resident, also reported seeing a green Chevrolet Impala the night of the robbery. Parks lived with her sister on Butler and was house-sitting for a friend across the street. She told police she had not previously seen the green car in the neighborhood. Parks initially told police she saw two people get out of the car. In describing the two individuals, she said one was short and chunky and the other was tall; both were dressed in black. In her trial testimony, Parks changed her story and said she lied about seeing two people. She only saw one person, a "short fat boy." He got out of the car before police arrived and returned a few minutes after police arrived and drove off in the car.

Annie Mae Broyles lived just two streets away from Stainbrook's home. Broyles knew defendant (also known as "KO") as a friend of her sons. The night of the robbery, Broyles received a telephone call from Parks, who was dating one of Broyles' sons. Parks told Broyles that defendant and someone else in a green car were trying to break into the house she was in. Later that night, about 11:00 or 11:30 p.m., Broyles' sons William Booker (Parks' boyfriend) and Davin Young were outside Broyles' home with their friend Danqual Matthews. While the three men were outside Broyles' house, defendant and Jermaine Osby (also known as "Boston J") approached on foot. Both defendant and Osby were dressed in dark colors. Broyles, who was watching the scene from her window, heard defendant brag about committing a home invasion on Butler Street. She heard defendant say he robbed someone on Butler and took "a cell phone, some money and some jewelry." In describing the robbery, defendant stated he made his victim lay on the floor and that he used a gun. Broyles saw what she believed to be a gun in defendant's hand.

Booker did not hear defendant's confession, but saw a semi-automatic pistol at Osby's waistband. Young did not remember seeing defendant or Osby that night, but remembered Booker telling him Osby said something about a gun. Matthews, Young, and Booker left Broyles house together in Matthews' car. Osby and defendant walked away on foot. At approximately 1:00 or 2:00 a.m. March 28, 2010, defendant and Osby were still together. They visited defendant's cousin, Randell Bell. Osby was driving the green Chevrolet Impala.

Broyles admitted she came forward with the information because she heard a rumor police were considering her sons as suspects for the robbery at Stainbrook's house. She also hoped to secure some sort of deal for her incarcerated daughter by offering information about the

robbery to the police. Although police refused Broyles' daughter any sort of deal, she still told them about defendant's admissions in her driveway. The parties stipulated that Broyles had previous convictions for welfare fraud less than \$500 and of larceny by false pretenses greater than \$1000 but less than \$20,000.

On March 29, 2010, police executed a traffic stop on a green Chevrolet Impala driven by Osby. A search of the green Impala revealed a Gucci tag which was sent for fingerprint analysis. Fingerprint analysis revealed the Gucci tag inside the Impala had fingerprints from both defendant and Osby.

On March 31, 2010, police pulled over a red Grand Am driven by defendant. In the backseat of the car were a black hoodie sweatshirt with a grey hood and a black bandana with a white design. Defendant also had a cellular telephone in his hand, which was the cellular telephone taken from Stainbrook's residence during the robbery. Defendant claimed he purchased the cell phone a month or a month and a half ago on the street. When told the telephone was recently stolen, he changed his story and said he bought it more recently.

In his interviews, defendant admitted he knew of Osby but had not seen or spoken to him in some time. He also denied ever being in the green Impala. His statements were contradicted by telephone evidence and witness testimony. Osby's girlfriend, Kamil Hyde, testified Osby and defendant were together on at least one occasion prior to the robbery. Several eyewitnesses put Osby and defendant together the night of the robbery. The Gucci tag, found in the Impala with both defendant and Osby's prints, was offered as further proof the two men knew each other. Osby's cellular telephone, seized during the stop of the Impala, showed Osby received a call on March 29, 2010, lasting one minute and eight seconds, from the number defendant claimed as his. Defendant was also listed in Osby's telephone contacts. When confronted with the telephone evidence, defendant said an unknown number showed up on his telephone and he called it to find out who it was.

Defendant denied any involvement in the robbery and maintained that he had spent the night of the robbery with "FiFi" Willis, a woman with whom he had a sexual relationship. When asked whether defendant was with her the night of the robbery, Willis initially told police she did not see defendant that night. She said he stayed with her Sunday evening, but not Saturday. In her trial testimony, Willis claimed she was so nervous she lied to police but she could not recall what she lied about.

The parties stipulated defendant had a previous felony conviction and could not have legally possessed a weapon. Defendant was convicted of armed robbery, first-degree home invasion, possession of a firearm by a felon, and possession of a firearm during the commission of a felony. He now appeals as of right.

II. SUFFICIENCY OF THE EVIDENCE

Defendant first argues that the evidence was insufficient to establish his identity as the gunman who committed the charged offenses. We disagree.

Appeals regarding the sufficiency of the evidence are reviewed de novo. *People v Lueth*, 253 Mich App 670, 680; 660 NW2d 322 (2002). When considering a claim of insufficient

evidence, the “court must view the evidence in a light most favorable to the prosecution and determine whether any rational trier of fact could have found that the essential elements of the crime were proven beyond a reasonable doubt.” *People v Johnson*, 460 Mich 720, 723; 597 NW2d 73 (1999). Determinations as to the weight of the evidence and the credibility of witnesses remain within the province of the trier of fact; this Court will not interfere with those determinations when reviewing sufficiency of the evidence. *People v Williams*, 268 Mich App 416, 419; 707 NW2d 624 (2005).

Establishing the identity of defendant as the perpetrator of the crime is an essential element of any criminal prosecution. *People v Oliphant*, 399 Mich 472, 489; 250 NW2d 443 (1976). Identity may be proven by either direct testimony or circumstantial evidence. *People v Kern*, 6 Mich App 406, 409-410; 149 NW2d 216 (1967). The trier of fact is free to determine what inferences may be “fairly drawn from the evidence and to determine the weight to be accorded those inferences.” *People v Hardiman*, 466 Mich 417, 428; 646 NW2d 158 (2002).

Viewing the evidence in a light most favorable to the prosecution, we find there is sufficient evidence to support defendant’s conviction. When stopped by police, defendant had in his possession the victim’s cellular telephone, which was taken during the robbery. As a matter of law, mere possession of stolen property is insufficient to support a conviction. *People v Hutton*, 50 Mich App 351, 357; 213 NW2d 320 (1973). However, the possession of stolen property is not without significance. “It is well established that the jury may infer that the possessor of recently stolen property was the thief.” *People v Hayden*, 132 Mich App 273, 283 n 4; 348 NW2d 672 (1984). Coupled with other facts or circumstances indicating guilt, unexplained possession of stolen property can offer sufficient evidence to support a conviction. *Hutton*, 50 Mich App at 357-360; *People v McDonald*, 13 Mich App 226, 236-237; 163 NW2d 796 (1968).

Here, there are numerous other “facts and circumstances” indicating defendant’s guilt. Defendant was armed with a gun, dressed in dark clothing matching the description provided by the victims, and in the vicinity of the victim’s home when the crime occurred. He was overheard admitting that he committed a home invasion on Butler Street. Police confirmed only one robbery on Butler Street was reported on March 27, 2010. Defendant told his friends he stole money and a cellular telephone, which were items taken during the home invasion in question. The robbery that defendant described to his friends involved the use of a gun and forcing the victim to get down on the floor. These details coincide with the details of the robbery at the victim’s home. Defendant was also found in possession of a bandana and sweatshirt matching the description of what the gunmen wore and he fit the physical description provided by the victims. Additionally, not only did defendant possess the stolen cellular telephone, he lied to police about when he obtained it. While the possession of the cellular telephone on its own may not support a conviction, when coupled the other facts and circumstances pointing to defendant’s identity as the gunman, we find there is sufficient evidence of defendant’s guilt.

III. SCORING OF OFFENSE VARIABLE 13

Defendant also challenges the scoring of offense variable (OV) 13, MCL 777.43, at 25 points. Defendant failed to object to the scoring of OV 13 at sentencing; accordingly, his claim is unpreserved. Unpreserved claims of sentencing error are reviewed for plain error. *People v*

Kimble, 470 Mich 305, 312; 684 NW2d 669 (2004). Under the plain error rule, defendant bears the burden of demonstrating a “clear or obvious” error occurred and that this error affected defendant’s substantial rights. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999).

OV 13 relates to a continuing pattern of criminal behavior. A score of 25 is appropriate when “[t]he offense was part of a pattern of felonious criminal activity involving 3 or more crimes against a person.” MCL 777.43(1)(c). In scoring OV 13, “all crimes within a 5-year period, including the sentencing offense, shall be counted regardless of whether the offense resulted in a conviction.” MCL 777.43(2)(a).

Defendant makes two arguments regarding the scoring of OV 13. First, defendant suggests his convictions do not demonstrate a “pattern” of activity but are instead multiple offenses arising from the same event. Defendant’s argument suggests it would be improper to use multiple offenses arising from the same event in the scoring of OV 13. His argument is without merit. This Court has previously held that multiple concurrent offenses arising from the same incident are properly used in scoring OV 13. *People v Harmon*, 248 Mich App 522, 532; 640 NW2d 314 (2001); *People v Wilkens*, 267 Mich App 728, 743-744; 705 NW2d 728 (2005). Accordingly, the trial court properly used defendant’s current armed robbery and home invasion convictions in assessing defendant’s pattern of felonious criminal activity against persons.

Defendant’s second argument regarding OV 13 suggests that OV 13 cannot be scored using convictions that are also used to score prior record variable (PRV) 7, MCL 777.57. PRV 7 is the prior record variable relating to subsequent or concurrent felony convictions. Where an offender has two or more subsequent or concurrent convictions the offenders is assessed 20 points. MCL 777.57(1)(a).

Defendant offers no authority suggesting offenses may not be scored under both OV 13 and PRV 7. Nothing in the statutory language of either PRV 7 or OV 13 suggests the offenses should not be used to score both variables. More broadly, it is not considered impermissible to use the same facts in scoring different variables provided the variables serve different purposes. *People v Jarvi*, 216 Mich App 161, 163-164; 548 NW2d 676 (1996); *People v Maben*, 208 Mich App 652, 655; 528 NW2d 850 (1995). OV 13 and PRV 7 serve unique purposes. PRV 7 addresses the commission of a number of felonies at the same time, regardless of whether these felonies demonstrate a pattern and regardless of the type of crime. MCL 777.57(1)(a). In contrast, OV 13 involves a pattern of felonious activity spanning a number of years and, in this case, specifically involving a danger to people. MCL 777.43(1)(c). In addressing distinct purposes, OV 13 and PRV 7 are legislatively designed to target specific conduct. We find that where both apply, as in defendant’s case, the trial court can properly assess points under both based upon the same offenses.

IV. CORRECTION TO JUDGMENT OF SENTENCE

Finally, the judgment of sentence states that defendant’s felony-firearm conviction should be served consecutively to his sentences for armed robbery and possession of a firearm by a felon. However, at sentencing, the trial court ordered that the felony-firearm sentence should run consecutively with armed robbery and home invasion, not possession of a firearm by a felon. When a clerical mistake is found on the judgment of sentence, the case may be remanded for the

administrative task of correcting the error. *People v Seals*, 285 Mich App 1, 19; 776 NW2d 314 (2009); *People v Herndon*, 246 Mich App 371, 392-393; 633 NW2d 376 (2001). Accordingly, we remand for the correction of the judgment of sentence to reflect the sentence imposed by the trial court.

Affirmed, but remanded for the correction of the judgment of sentence in accordance with this opinion. We do not retain jurisdiction.

/s/ Joel P. Hoekstra
/s/ Kirsten Frank Kelly
/s/ Jane M. Beckering